ASSOCIATED METAL SMELTERS LTD. v. THAM CHEOW TOH

[O.C.J. (Abdul Hamid J.) February 8, 1971]

[Kuala Lumpur — Civil Suit No. 1726 of 1967]

Contract — Breach of — Sale of goods — Goods not according to specification — Breach of warranty — Damages.

Damages — Sale of goods — Breach of warranty — Quantum.

Sale of Goods — Goods not according to specification — Whether breach of condition or warranty — Sale of Goods Ordinance, 1957, ss. 12, 13.

In this case the plaintiffs claimed damages for breach of warranty of a metal melting furnace. The defendants had agreed to sell the furnace to the plaintiff and had given an undertaking that the melting furnace will have a temperature of not lower than 2,600°F. The furnace supplied by the defendants in fact did not meet the required temperature.

Held: the failure on the part of the defendant to supply a furnace which would meet the required temperature constituted a breach of the condition of the contract entitling the plaintiffs to treat such breach as a breach of warranty.

Cases referred to:-

(1) *J.J. Savage & Sons Pty Ltd.* v. *Blakney* (1970) 44 A.L.J.R. 123.

(2) *De Lassalle* v. *Guildford* [1901] 2 K.B. 215.

(3) *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Rly. Co. of London Ltd.* [1912] A.C. 673 at p. 690.

CIVIL SUIT.

J. James Puthucheary for the plaintiffs.

Ronald Khoo for the defendants.

Cur. Adv. Vult.

Abdul Hamid J.: The plaintiffs, a limited company incorporated in Malaysia and carrying on business at No. 9, Jalan Tengah, Kuala Lumpur, are claiming damages for breach of warranty of a metal melting furnace.

The defendants are the sole-proprietors of Tham Engineering Works carrying on business at No. 3, Jalan Ampat off Jalan Chan Sow Lin, Kuala Lumpur.

The plaintiffs' allegation as set out in paragraphs 3, 4 and 5 of the statement of claim are as follows —

"3. By an agreement contained in letters of August and September 1966 from the plaintiff to the defendant and from the defendant to the plaintiff (hereinafter referred to as 'the said agreement') it was agreed that the defendant should sell to the plaintiff a high temperature tilting Metal Melting Furnace fired by gas (hereinafter referred to as 'the said furnace').

4. At the time of the agreement the plaintiff expressly made known to the defendant that the said furnace was being purchased for the purpose of smelting lead, for which purpose it was imperative that the said furnace should be able to reach a temperature of 2,600°F and it was an express condition of the said agreement that the said furnace should be reasonably suitable for smelting lead and in particular that the said furnace should be able to reach a temperature of 2,600°F (hereinafter referred to as 'the said condition').

5. In breach of the said condition the defendant delivered to the plaintiff the said furnace which was not suitable for smelting lead, and in particular the said furnace was not able to reach the required temperature of 2,600°F. The defendant has failed to render the said furnace reasonably suitable for smelting lead and in particular to reach the temperature of 2,600°F. By reason of the said breach the plaintiff has suffered a loss of profits which it would have made had the said furnace been able to smelt lead."

The defendants admit paragraph 3 of the statement of claim but deny that there was a breach of any warranty and that it was an express condition of the agreement that the furnace should be able to reach a temperature of 2,600°F. The defendants contended that it was agreed the furnace should withstand a temperature of 2,600°F and maintained that the furnace as supplied was capable of so doing.

The defendants also denied the allegation contained in paragraph 5 of the statement of claim. They contended that the furnace supplied to the plaintiffs was in accordance with the agreement arrived at between the parties and in accordance with the plaintiffs' specification.

The defendants counter-claimed a sum of $15,600 being the balance due to them for the price of the furnace and the cost of supplying one unit Honeywell Model 5500101-1-02-01 Servtronik Horizontal Indicating Controller Radiamatic Actuator.

It is revealed from the evidence of Baillie Reynolds (P.W. 1) that in June, 1966, the plaintiff company wanted to place an order with the defendant company for a melting furnace. An enquiry was made through Esso who sent one David Wong. At a discussion, P.W. 1 told David Wong that the plaintiff company wanted a furnace that could work at a minimum temperature of 2,600°F. P.W. 1 himself went to see the defendant (D.W. 2) and explained to him the purpose of his visit. He specifically inquired as to the problem of heat and was told by D.W. 2 that it was a question of the size of the burner and the quantity of the gas.

On August 13th 1966, the defendants sent a quotation, the relevant part of which is reproduced hereunder —

"To supply one high temperature metal melting furnace according to your specification as per drawing supplied. The furnace will be constructed with ¼ inch mild steel plate as outer casing and fully insulated with 4½" best quality insulating bricks. The refractory used in the melting hearth will be Alumina Silica which can withstand temperature up to 2600 degrees F. The gas burner used will be of gas-air premix type which can produce to 2,000,000 Btu per hour with the aid of a 2 H.P. blower.

... M$16,000/-

Total: Dollars Sixteen Thousand only.

Delivery will be about 45 days after confirmation of order had been received. It may interest you to know that most essential parts of this high temperature tilting type metal melting furnace are specially air-freighted from overseas. Only the metal works are made locally. Therefore you can be rest assured that the furnace we undertake to manufacture will be as good as those imported ones, if not better. Assuring you of our best attention at all times, we remain,

Yours very truly,
Sgd. ? "

P.W. 1 said that a drawing giving the specification of the furnace was submitted to him together with the quotation. After discussing it with the other directors of the company, it was decided that the quotation was

not exactly according to their requirement. What they required was an operating temperature of 2,600°F whereas the quotation merely stated that the lining can withstand that temperature. P.W. 1 also testified that David Wong called in to inquire whether the plaintiff company was accepting the quotation. He explained the discrepancy to David Wong. He issued the order and asked David Wong to get the defendants to confirm that the operating temperature required could and would be reached.

There seems to be some dispute concerning the source of the drawing. D.W. 2 at first alleged that the drawing was given to him by P.W. 1. Subsequently he said that the drawing was given by the plaintiffs. Mr. David Wong would probably be able to throw some light as to the source of the drawing but he is not available to give evidence. P.W. 1, on the other hand, said that he received the drawing with the quotation from the defendant company and it was the first time he saw it. On the evidence before me, it would appear that David Wong was the go-between and in the light of the plaintiffs' letter it may well be that David Wong was the person responsible for the preparation of the drawing.

On 2nd September, 1966, an assurance was given by the defendants in the following terms —

"Dear Mr. Ballie Reynolds,

Thank you very much for your order which was handed over to us by Mr. David Wong and we are pleased to advise you that the construction work of the high temperature melting furnace is now in progress. As requested by you, we have made inquiry with Mecomb (M) Ltd. requesting them to quote us on the Radiomatic Detector and the temperature controller having a maximum range of 3000 degrees F. As soon as we receive the quotation from them, we shall write to you again advising you the rate for such controlling instruments. We wish also to assure you that the high temperature melting furnace will have a temperature of not lower than 2600 degrees F. and can be properly controlled by the Radiomatic Detector connected to the Temperature Controller. Assuring you of our best attention at all times we remain,

Yours very truly,
THAM ENGINEERING
Sgd. ?
Manager."

According to P.W. 1, the furnace was not delivered on the day agreed upon by the defendants. Instead it was delivered some time during the third week of January, 1967. The furnace was test-fired but it did not reach the temperature required. The defendant company was given opportunities to make it work but even after a second burner was added, it still did not reach the required temperature.

The plaintiffs saw their solicitors and after some correspondence, the defendants carried out a final test. This was done in June, 1967 but the temperature of 2,600°F was still not reached.

The defendants argued that they manufactured the furnace in accordance with the plaintiffs' specification and urged the court to consider their letter of quotation and make a finding that what the defendants agreed to supply was a furnace according to these specifications. On the facts of this case, I am unable to hold that this is a valid argument. It must be remembered that the defendants did give the assurance to the plaintiffs. By so doing, they must be assumed to have concluded after making the necessary assessment that they could in fact manufacture a furnace capable of producing a temperature of not lower than 2,600°F. Furthermore as manufacturers of melting furnaces, it was highly improbable that they did not know that to produce a furnace with the required temperature they had to depend not only on the specification but also on their knowledge and skill. They cannot therefore be heard to say that they are not liable if the furnace does not reach the required temperature because what they had to do was to manufacture according to the specifications. Moreover, it is clear that the drawing only provides certain specifications, for example, the type of material, size of the furnace, thickness of metal etc. No provision was made in the drawing as regards heat. It was a matter which the defendants were solely responsible and in respect of which the plaintiffs could only rely on the defendants' skill and judgment.

It is true that when the defendants submitted the quotation, they only gave the assurance that it could withstand a temperature of 2,600°F but they subsequently agreed to manufacture the furnace which could reach a temperature of not lower than 2,600°F. That agreement was contained in the defendants' letter dated 2nd September, 1966 and I am satisfied that it formed the necessary part of the contract between the plaintiffs and the defendant company.

Mr. Khoo further submitted that the crux of the matter is whether the furnace can melt lead. In this regard there is the evidence of P.W. 1 who stated that he told the defendants that the purpose of the furnace was to refine lead. D.W. 2 at first denied that he was aware of this but subsequently, under cross-examination, admitted that Mr. Reynolds told him that it could possibly melt lead or other things. On the evidence before me, it seems improbable that the defendants had not known the purpose for which the furnace was required. In any event, I do not think it is really necessary for this court to consider whether the furnace can or cannot melt lead. The defendants agreed to supply a furnace which could reach a temperature of not lower than 2,600°F and they were bound by that agreement. The defendants testified that it is their principle that when a customer orders a thing from them, what they would have to do was to manufacture it and would not care what the customer uses it for. It strikes me as being rather unusual for the defendants to say this after claiming that they were competent manufacturers of melting furnaces and when they in fact agreed to manufacture the furnace for the plaintiffs with full knowledge of the purpose for which the furnace was to be used.

Mr. Khoo contended that 2,600°F was required to be reached within one hour and yet nothing was said in the contract. It is true that no time was prescribed but it cannot be denied that the defendants themselves had given an unqualified agreement that the furnace would reach a temperature of not lower than 2,600°F. The result of the test-firing has shown that at no time at all was a minimum temperature of 2,600°F reached even after another burner was added.

D.W. 2 alleged that after the final test was carried out for 1½hours, Mr. Rossi chased him away. At that time the temperature reached was 2,550°F. On the facts of the case, I am unable to accept D.W. 2's evidence that Mr. Rossi did drive him away. The extent to which D.W. 2 is prepared to gamble in order to defend the suit is apparent from the sudden proposition advanced by him to the effect that the furnace could reach 2,600°F if it is fired for 3 hours. The correspondence between the plaintiffs' and defendants' solicitors clearly shows that nothing was said by the defendants in any of their letters.

The plaintiffs' counsel, Mr. James Puthucheary, submitted that this case falls within section 12 of the Sale of Goods Ordinance, 1957. There is established, he said, either a repudiation or a non-fulfilment in which case it may be treated as a breach of warranty under section 13 (1) of the Ordinance. Mr. Puthucheary referred to an Australian case, *J. J. Savage & Sons Pty. Ltd.* v. *Blakney*[1] where at page 123 it was held on appeal from the Supreme Court of Victoria (full court) that —

"It is not sufficient in order to establish a warranty collateral to a contract that without the statement alleged to constitute the warranty the contract would have been made."

The joint judgment of the court at page 125 stated that —

"The question is whether there was a promise by the appellant that the boat would in fact attain the stated speed if powered by the stipulated engine, the entry into the contract to purchase the boat providing the consideration to make the promise effective. The expression in *De Lassalle* v. *Guildford*,[2] at p. 222, that without the statement the contract in that case would not have been made does not, in our opinion, provide an alternative and independent ground on which a collateral warranty can be established. Such a fact is but a step in some circumstances towards the only conclusion which will support a collateral warranty, namely, that the statement so relied on was promissory and not merely representational."

Mr. Puthucheary submitted that in the present case, there is a collateral warranty. He drew the court's attention to the evidence of P.W. 1 who said that without the assurance from the defendants as contained in the defendants' letter of 2nd September, the order would have been cancelled. In the light of the case cited by Mr. Puthucheary, it may of course be argued by the defendants that their letter of 2nd September did not in fact constitute a promise. It is I think a question of fact. Having regard to the facts of this case, it is, to my mind, an inescapable conclusion that the assurance given by the defendants was not merely representational but promissory. The facts of this case are not similar to the facts of the case cited by Mr. Puthucheary. There the judge found that the statement in the appellant's letter was an estimate only expressed in an expectancy and not an unequivocal promise of a future speed. The defendants in the instant case did not deny that they gave the written undertaking and they unequivocally stated that —

"... the high temperature melting furnace will have a temperature of not lower than 2,600°F."

In the circumstances, I am of the view that the failure on the part of the defendants to supply a furnace which would meet the required temperature, constituted a breach of the condition of the contract entitling the plaintiffs to treat such breach as a breach of warranty.

For the reasons which I have stated above, it is my judgment that the defendants are liable for the breach of the condition of the agreement and the plaintiffs' claim should therefore succeed.

As regards the counter-claim, I think it has to be considered in the light of paragraph 6 of the statement of claim. The plaintiffs have specifically taken into account (item 5) the capital cost of the furnace. What the plaintiffs in effect are claiming is the damages for breach of the warranty under section 59 (1) (b) of the Sale of Goods Ordinance, 1957. It does not appear that the plaintiffs are setting up against the defendants the breach of warranty in extinction of the price If the plaintiffs' claim should fail it would follow that the defendants' counter-claim would succeed. As such, I think the defendants have quite properly set up a counter-claim for the balance of the payment due on the furnace supplied.

Mr. Puthucheary submitted that the plaintiffs were required to mitigate the damages which flowed from the breach of the condition. A new furnace was purchased at a cost of $15,000. They also incurred certain incidental expenses. The plaintiffs contended that the furnace supplied had not reached the required temperature and the defendants were told of the arrangement to import another furnace. This was contained in the letter from the plaintiffs' solicitors dated June 26th (page 50 AB). This letter also referred to the defendants' letter dated June 21st, the contents of which are not known. However, in the light of the first sentence in paragraph two of the plaintiffs' letter of June 26th, it would appear that even on that date *i.e.* 21st of June, the defendants were still suggesting that further modifications be made. Having regard to the ample opportunities which the plaintiffs gave the defendants to make good, the plaintiffs acted quite properly when they chose the only course open to them to mitigate the damages. To my mind, the action taken by the plaintiffs was "one which a reasonable and prudent person might in the ordinary conduct of business properly have taken." [Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Company, Limited*].[3] The learned Lord Chancellor further said —

"... The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business."

In this connection, I should also like to quote what the learned Lord Chancellor said at page 689 which I think is relevant for purposes of considering the damages to be awarded —

"... I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed."

In this connection there is one minor point which I think I ought to consider. The defendants alleged that the plaintiffs were using the furnace. It is, I think, a question of fact and on the evidence before me, I

am not satisfied that the allegations are made out by the defendants.

As regards the claim for the price of the new furnace and incidental expenses, I think the plaintiffs are entitled to succeed. Since the plaintiffs are not asking that the price of the furnace supplied be extinguished, the capital cost of that furnace less payment which the plaintiffs had already made, should be a set-off against the price of the new furnace paid by the plaintiffs. Out of this, there is still a balance of $101.38 which the plaintiffs are entitled to receive. I also allow the charges of $400 for gas claimed under item (2). As regards loss of profits, Mr. Reynolds said that the company was unable to use the furnace for a certain period. He quoted certain figures and estimated that the loss was around $200 per day. To my mind, it is for the plaintiffs to produce sufficient evidence upon which the court may reasonably assess the damages. Though it cannot be denied that the plaintiffs did in all probability suffer loss of profits, I am unable, on the material available, to make a conclusive finding that they did in fact suffer loss of profits of a sum of $200 per day. I therefore feel that a sum of $50 per day would be a reasonable sum to be awarded for loss of profits. Under this head I award a sum of $7,000 for loss of profits for the period from 7th April to 1st October. I therefore enter judgment for the plaintiffs for the sum of $7,501.38

As regards costs, the defendants shall pay the plaintiffs' costs of the claim and the defendants shall be entitled to costs on the counter-claim.

Judgment for the plaintiffs on the claim; counter-claim allowed.

Solicitors: *Skrine & Co., Shearn, Delamore & Co.*

TAN HIN JIN & ANOR. v. PRABHULAL G. DOSHI

[F.C. (Azmi L.P., Suffian & Ali F. JJ.) February 12, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 97 of 1970]

Administrative Law — Certiorari — Mandamus — Application for — Decision of Appeal Board under Control of Rent Act, 1966 — Whether error of law apparent on the face of the record.

This was an appeal from the decision of Abdul Hamid J. ([1971] 1 M.L.J. 141) dismissing the appellants' application for an order of *certiorari* and of *mandamus*. The appellants sought those remedies in reference to an order of the Appeal Board set up under the Control of Rent Act, 1966. The Rent Tribunal had determined that the fair rent of the premises in question should be $860 a month. The tenant/respondent appealed against this decision to the Appeal Board, who varied the order by reducing the fair rent of the premises to $600 a month. The landlords/appellants then applied to the High Court for the order of *certiorari* and of *mandamus* alleging that there was an error on the face of the record.

Held, dismissing the appeal: (1) in this case there was nothing apparently wrong in the finding of the Appeal Board that the tenant had been spending a considerable amount of money to keep the premises in good condition and in their taking this into consideration;

(2) the record in this, that is, the grounds of decision, did not show that the improvements to the premises had been made with the consent of the landlords and therefore there was no error of law apparent on the face of the record.

Cases referred to:-

(1) *R.* v. *Northumberland Compensation Appeal Tribunal* [1951] 1 All E.R. 268; [1951] 1 K.B. 711, aff. C.A. [1952] 1 K.B. 338.

(2) *Metropolitan Properties Co. Ltd.* v. *Wooldridge & Anor.* (1968) 112 S.J. 862.

FEDERAL COURT.

Kok Wee Kiat for the appellants.

S. Y. Chan for the respondents.

Azmi L.P.: We have dismissed the appeal and here are my reasons.

The appellants are the executors and trustees of the estate of Tan Cheng Tiong deceased, and the owners of certain controlled premises in the Federal capital of Kuala Lumpur. The respondent is the tenant of the said premises.

The Rent Tribunal for the said area, on the application of the appellants determined that the fair rent of the said premises pursuant to the provisions of section 7(vi) of the Control of Rent Act 1966, should be $860 a month.

The tenant was not satisfied with that decision and appealed against it to the Appeal Board, and on 8th December 1969 the Appeal Board varied the said order of the Rent Tribunal by reducing the fair rent of the said premises to $600 a month. There is no further appeal under the provisions of the Act because in section 15 of the Act it says that "any decision made thereon by the Appeal Board shall be final and shall not be questioned by any court."

The landlord then applied to the High Court for an order of *certiorari* and of *mandamus* in reference to the order of the Appeal Board. The opportunity for a decision whether this may be done by reason of the words "and shall not be questioned by any court" was not taken by either side, either before the High Court or before us here. So the matter came before Abdul Hamid J. for a decision only as to whether there was error on the face of the record. The record in this case consists only of the grounds of decision of the board. In *Rex* v. *Northumberland Compensation Appeal Tribunal*,[1] a decision of the King's Bench Division, Lord Goddard C.J. said at page 277 in reference to that case: —

"The result of that clearly seems to me to be that a court before whom this order is brought can examine it. The tribunal has told us what they have taken into account, what they have disregarded, and the contentions which they accepted. They have told us their view of the law, and for the reasons which I gave at the beginning of my judgment this court is of opinion that the construction which they placed on this very complicated set of regulations was wrong. It is perfectly true, as counsel for the tribunal pointed out, that there have been several other cases, principally under the Furnished Houses (Rent Control) Act, 1946, in which the court has refused to grant *certiorari*, but in none of those cases were there speaking orders, or, if there were, the court has proceeded on the same error that the Court of Appeal fell into in the *Racecourse Betting Control Board* case. . . ."